89-755

No. ———

FILED
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JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

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MICHAEL E. WILLIAMS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

———

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

———

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NOVEMBER 1989

QUESTION PRESENTED

Whether the petitioner was denied due process of law when the military judge failed to provide the petitioner with an urinalysis expert consultant, at government expense, to assist the petitioner in the preparation and presentation of his defense.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. ———

MICHAEL E. WILLIAMS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

The petitioner, Michael E. Williams, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Military Appeals entered in his case on September 8, 1989.

OPINIONS BELOW

The opinion of the United States Air Force Court of Military Review, ACM 26705, was issued on October 19, 1988 and was not published (Appendix A). The opinion of the United States Court of Military Appeals is reported at 28 M.J. 484 (C.M.A. 1989) (Appendix B).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1259(3) and 10 U.S.C. § 867(h) (Supp. III 1985). The judgment of the United States Court of Military Appeals was entered on September 8, 1989.

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment of the United States Constitution provides:

> No person shall be . . . deprived of life, liberty, or property without due process of law. . .

STATUTORY PROVISIONS INVOLVED

10 U.S.C. § 846, Article 46 Uniform Code of Military Justice:

> Opportunity to obtain witnesses and other evidence. The trial counsel, the defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe. Process issued in court-martial cases to compel witnesses to appear and testify and to compel the production of other evidence shall be similar to that which courts of the United States having criminal jurisdiction may lawfully issue and shall run to any part of the United States, or the Territories, Commonwealths, and possessions.

Rule for Courts-Martial 703(d):

> Employment of expert witnesses. When the employment at Government expense of an expert is considered necessary by a party, the party shall, in advance of employment of the expert, and with notice to the opposing party, submit a request to the convening authority to authorize the employment and to fix the compensation for the expert. The request shall include a complete statement of reasons why employment of the expert is necessary and the estimated cost of employment. A request denied by the convening authority may be renewed before the military judge who shall determine whether the testimony of the expert is relevant and necessary, and, if so, whether the Government has provided or will provide an adequate substitute. If the miliary judge grants a motion for employment of an expert or finds that the Govern-

ment is required to provide a substitute, the proceedings shall be abated if the Government fails to comply with the ruling. In the absence of advance authorization, an expert witness may not be paid fees other than those to which entitled under subsection (e) (2) (D) of this rule.

STATEMENT OF THE CASE

The petitioner was tried by general court-martial in October 1987, at McGuire AFB, New Jersey. Contrary to his plea, he was convicted of one specification of wrongfully using cocaine, in violation of Article 112a, Uniform Code of Military Justice, 10 U.S.C. § 912a. The petitioner was sentenced to confinement for nine months, forfeiture of $150.00 pay per month for nine months, reduction to the grade of airman basic and to be discharged from the Air Force with a bad conduct discharge. The convening authority reduced the amount of forfeitures to $150.00 pay per month for one month and approved the rest of the sentence on February 19, 1988.

The government's entire case rested upon the results of an urinalysis test and the testimony of the government's expert witness, Dr. Naresh C. Jain,[1] to interpret the test results. The petitioner donated his sample pursuant to a random inspection on January 9, 1987.

Prior to trial, on August 26, 1987, the petitioner requested, from the convening authority, the employment of Dr. John D. Whiting as an expert consultant for the defense, at government expense. *See*, R.C.M. 703(d). On September 9, 1987, the convening authority denied this request.

The petitioner renewed his request at trial to employ Dr. Whiting as an expert consultant. The military judge called Dr. Jain, the government selected and employed

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[1] Dr. Jain is a civilian toxicologist, often hired by the government to testify at courts-martial as to the validity of the urinalysis testing procedures.

expert, to testify on the motion. On direct-examination Dr. Jain testified he was an expert in forensic toxicology hired by the government to interpret the test results of the urinalysis test performed in this case. He further testified he was available to consult with the defense and would tell the defense if he discovered any errors in the test.

On cross-examination, Dr. Jain stated he intended to testify the results in this case were forensically valid. He agreed other experts might disagree as to the validity of the testing method, but stated his testimony was "not impeachable."

After Dr. Jain testified, the military judge asked the trial defense counsel to explore the possibility the defense request could be met with government resources. The next morning the military judge denied the defense request for Dr. Whiting. The defense then moved for a *military* expert consultant.

Government trial counsel proffered Lieutenant Colonel Ottinger, from the Brooks Laboratory,[2] was available as a defense consultant. However, he was determined to be unacceptable because of his connection with the preparation of the urinalysis test results in this case.

Government trial counsel then suggested some other possibilities of persons who could act as consultants. It then became a logistics problem, as to how soon the consultant could arrive and help trial defense counsel prepare for trial, in light of the fact the military judge had traveled to the situs of the trial and wanted to complete the trial at that time. After about a twenty minute recess, the court reconvened. The military judge did a 180 degree turn and precluded any further search for a mili-

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[2] The Brooks Laboratory at Brooks AFB, San Antonio, Texas, is where the Air Force sends the majority of its urine specimens collected in the continental United States for urinalysis testing.

tary expert consultant. He ruled Dr. Jain was available, through government resources, to consult with the defense. Additionally, the military judge concluded Dr. Jain was not biased or favored for either side and was an "adequate substitute" for the defense requested consultant.

The military judge's opinion that Dr. Jain was not a biased witness was conveyed to the court members when during *voir dire* by the trial defense counsel, the military judge *sua sponte* instructed the court members that although Dr. Jain was called as a witness by the government he did not in "any way" represent the government.

At the Air Force Court of Military Review, the first level of appellate review, that Court astutely noted what the petitioner was requesting was an expert "consultant" and not a "witness." Even though the Court recognized "a military accused is entitled to have an equal opportunity with the Government to obtain witnesses in his defense," and this access includes investigative or other expert assistance, the Court held the military judge did not err by only providing the defense with access to Dr. Jain as a sufficient means to permit the defense to prepare for trial. *United States v. Williams*, ACM 26705 (A.F.C.M.R. 1988) (Appendix A). The Air Force Court of Military Review affirmed the findings of guilty and the sentence on October 19, 1988.

The same issue was raised to the United States Court of Military Appeals. They took a more narrow approach to the case and specified the following issue:

> WHETHER THE MILITARY JUDGE'S INSTRUCTION THAT DR. JAIN WAS NOT A GOVERNMENT WITNESS PREJUDICED APPELLANT.

The United States Court of Military Appeals held the military judge's characterization of Dr. Jain was erroneous. However, they felt the instruction did not have a

prejudicial effect on the members' deliberations and affirmed petitioner's conviction. *United States v. Williams*, 28 M.J. 486 (C.M.A. 1989) (Appendix B).

REASONS FOR GRANTING THE WRIT

This Court "recognized long ago that mere access to the courthouse doors does not by itself assure a proper functioning of the adversarial process, and that a criminal trial is fundamentally unfair if the State proceeds against an indigent defendant without making certain that he has access to raw materials integral to the building of an effective defense." *Ake v. Oklahoma*, 470 U.S. 68, 77 (1985). This is especially true in the military. In order for a courts-martial to be fair, an accused must be given the same access to government resources as the prosecutor. The petitioner's Fifth Amendment right to Due Process was violated by the military judge denying the petitioner's request for a toxicologist as a defense consultant, at government expense.

According to military rules, as opposed to most state statutes, proof of indigency is not required before requesting the government pay for an expert. R.C.M. 703(d). In the case *sub judice*, the convening authority approved the prosecutor hiring a civilian expert to testify for the government regarding the validity of the results of a urinalysis test. However, the convening authority denied the defense's request for an expert that questions the validity of the results in a urinalysis test. The military judge then supported that denial.

The petitioner was charged with one specification of wrongfully using cocaine. The only evidence the government had against the petitioner was the results of the urinalysis. There was no testimony anyone saw the petitioner use cocaine. The United States Court of Military Appeals (C.M.A.) has said "[w]e are not persuaded that the scientific principles of urinalysis are matters of 'com-

mon sense' or of 'knowledge of human nature.'" *United States v. Murphy*, 23 M.J. 310, 311 (C.M.A. 1987); *see also*, *Ake v. Oklahoma*, *supra*, at 80-81. Before the results of an urinalysis can be introduced to the trier of fact they require an expert witness must testify to interpret the test results for the fact finder. *Id.* at 312.

Once the government establishes the chain of custody and has their expert testify on the urinalysis results, they can rest. They do not need to present any evidence of wrongfulness or disclose under what situation the drug was ingested. That element is provided by the military judge in his instructions. The instruction provides that from a positive urinalysis the members can infer use, and from use they can infer the accused knew of the presence of the substance in his system and the contraband nature of the substance. *United States v. Mance*, 26 M.J. 244 (C.M.A. 1988), *cert. denied*, —— U.S. ——, 109 S. Ct. 367, 102 L.Ed.2d 356 (1988).

Therefore, it is crucial the petitioner be provided some tools with which to prove his innocence. The petitioner took the stand and denied ever using cocaine. But, without an expert with which to attack the urinalysis results, there is no evidence he can present which will clear him of the charge.

Only a toxicologist can attack the validity of an urinalysis. The military judge said the defense could use Dr. Jain, the government expert, to question the test. However, Dr. Jain testified his testimony was "not impeachable." Additionally, Dr. Jain conceded he would be of little help to the defense in drafting questions for cross-examination.

Common knowledge among military judge advocates is there are several qualified experts that question the validity of the Department of Defense (DOD) urinalysis program, especially when testing for cocaine. One of these experts is Dr. Whiting. Dr. Whiting is employed by Toxi-

chem Laboratories, Inc., in Gaithersburg, Maryland. He was formerly employed by the Armed Forces Institute of Pathology with responsibility for the Air Force drug testing program.

The defense, in its "preliminary showing," requested Dr. Whiting as an expert who could help the defense attack the results of the petitioner's urinalysis test as well as the whole DOD urinalysis program. Some of the things they sought to contest were the actual testing procedures used, quality control standards, which cocaine metabolite was being tested for, how the DOD cutoff for positive urinalysis is established and what the margin of error is. The defense was putting the military judge on notice the validity of the urinalysis test was going to be a significant issue at trial and a competent toxicologist was necessary to examine and evaluate the test results and assist in the preparation and presentation of the defense. *See Ake v. Oklahoma, supra,* at 74 and 83.

In *Ake v. Oklahoma, supra,* the trial court refused to provide the defense with a psychiatrist to evaluate the defendant's mental state at the time of the offense. This Court held, ". . . when a defendant has made a preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial, the Constitution requires that a State provide access to a psychiatrist's assistance on this issue if the defendant cannot otherwise afford one." *Id.* at 74. "[T]he testimony of psychiatrists can be crucial and 'a virtual necessity if an insanity plea is to have any chance of success.' (cite omitted)." *Id.* at 81. "[A] defense may be devastated by the absence of a psychiatric examination and testimony; with such assistance, the defendant might have a reasonable chance of success." *Id.* at 83.

Petitioner testified he had never used cocaine. He has no idea how the cocaine was introduced into his system. The defense theory of the case was unknowing ingestion.

The only viable defense available to him was to attack the validity of the urinalysis test. It is impossible to mount a successful, or even credible, attack using the government's expert. The testimony of a defense toxicologist is a virtual necessity if the defense of unknowing ingestion is to have any chance of success. With the testimony of a defense toxicologist the petitioner then has a reasonable chance of success.

If this Court does not hear petitioner's case, hundreds of military accuseds will be tried by courts-martial without the ability to mount a meaningful defense once a positive urinalysis has been reported against them. The law as it stands today is fundamentally unfair because it denies accuseds ". . . access to the raw materials integral to the building of an effective defense." *Id.* at 77.

CONCLUSION

The petitioner submits he has suffered a denial of Due Process. Therefore, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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NOVEMBER 1989

APPENDICES

APPENDIX A

UNITED STATES AIR FORCE
COURT OF MILITARY REVIEW

UNITED STATES

v.

Technical Sergeant MICHAEL E. WILLIAMS,
FR 429-04-4477
UNITED STATES AIR FORCE

ACM 26705

[19 Oct. 1988]

Sentence adjudged 22 October 1987 by GCM convened at McGuire Air Force Base, New Jersey. Military Judge: William T. Snyder.

Approved Sentence: Bad conduct discharge, confinement for nine (9) months, forfeiture of one hundred fifty dollars ($150.00) per month for (1) month and reduction to airman first class.

Appellate Counsel for the Appellant: Colonel Leo L. Sergi and Lieutenant Colonel Patrick C. Sweeney.

Appellate Counsel for the United States: Colonel Joe R. Lamport, Lieutenant Colonel Robert E. Giovagnoni and Lieutenant Colonel Barret E. Kean, USAFR.

Before

HODGSON, FORAY and HOLTE
Appellate Military Judges

DECISION

PER CURIAM:

The appellant was convicted, contrary to his plea, by a general court-martial with members, of one charge of cocaine use in violation of Article 112a, UCMJ.

Prior to trial, on 26 August 1987, the defense made a written request to the convening authority for funding to employ Doctor John D. Whiting as an expert technical consultant. This request was predicated on the fact that the government case was based entirely on a positive urinalysis for cocaine metabolites, and the reliability of the testing procedures, as well as the accuracy of the results thereof, were material issues in the case. The defense asserted that for these reasons Doctor Whiting's expertise was necessary for both the preparation and presentation of the defense case. On 9 September 1987 this request was denied without explanation.

At the first session of trial the request was renewed. The military judge called Doctor Naresh C. Jain, the government expert witness to the stand to be heard on the motion. He testified that he was an expert in forensic toxicology hired by the government to interpret the test results of the urinalysis tests performed in this case. He stated that he was available to consult with the defense counsel and would tell them of anything he found wrong in the tests. He stated that he intended to testify that the results of the tests in this case were forensically valid. He agreed that other experts might disagree on different test methods, but stated his testimony was not impeachable. Doctor Jain restated his willingness to discuss the case with the defense and his lack of any particular interest in the outcome of the case.

After Doctor Jain's testimony the military judge inquired of defense counsel if he was requesting a consultant or a witness. His reply was that he was requesting a consultant, however, if Doctor Jain testified to some-

thing on direct examination which the defense had not heard they would then have a rebuttal witness to the government's case in chief. After denying the motion for the production of Doctor Whiting as an expert consultant at government expense, the military judge directed the trial counsel to explore possibilities whether the defense needs could be met through government sources. Two available witnesses were located at the Brooks Air Force Base Laboratory. However, it was concluded that there would be a conflict of interest in using either as they were involved in the testing of the urine specimen which was the subject of the charges against the accused. There was a brief discussion as to the availability of other witnesses within government resources, however, it was not pursued nor was a final determination made. Doctor Jain was then made available to the defense. At the conclusion of Doctor Jain's testimony for the prosecution the defense conducted an extensive cross examination. At the conclusion of the government's case the defense did not renew its motion for the production of Doctor Whiting, nor did they do so at the completion of their cross examination of Doctor Jain.

The appellant now argues that the military judge erred when he required him to accept the government expert witness as his own expert consultant.

It is clear from both the original request and the request at trial that what was being requested was an expert consulant, not an expert witness. When specifically asked by the military judge the defense stated he was requesting a consultant not a witness, further stating that "if he heard something on direct testimony that he had not heard before he would have a rebuttal witness." The defense admitted that they had had adequate access to Doctor Jain to fully review the litigation package with him and to get his professional assessment. However, they maintained that Doctor Jain was unable to provide

the assistance desired by the defense without specifically stating the desired assistance.

It has long been the law that a military accused is entitled to have equal opportunity with the Government to obtain witnesses to assist in his defense. Art. 46, UCMJ. As a matter of military due process, servicemembers are entitled to investigative or other expert assistance when necessary for an adequate defense. *Cf. United States v. Mustafa*, 22 M.J. 165 (C.M.A. 1986); *United States v. Garries*, 22 M.J. 288 (C.M.A. 1986). However, these rights and entitlements are not unlimited or without restriction. The law does not automatically give an accused the right to the expert witness of his choice. *Ake v Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087, 1097, 84 L.Ed.2d 53 (1985). Here, the appellant requested a specific expert by name. There was no explanation as to why he felt that only this particular expert was capable of serving as his expert consultant, nor did he detail what the requested expert consultant would testify to or how he would assist in the preparation of the defense.

When an accused applies for the employment of an expert, he must demonstrate the necessity for such services, which is more than just a mere possibility of assistance from such expert, before one can be appointed for him at government expense. Absent a showing of necessity, there is no requirement for the government to provide the expert. *United States v. Kinsler*, 24 M.J. 855 (A.C.M.R. 1987). The accused must show that there exists a reasonable probability both that the expert would be of assistance to the defense and that denial of expert assistance would result in a fundamentally unfair trial. *See Moore v. Kemp*, 809 F.2d 702 (11th Cir.), *cert. denied*, —— U.S. ——, 107 S.Ct. 2192, 95 L.Ed.2d 847 (1987). In the case before us the requests for an expert consultant did not state specifically, or even generally, in just what capacity such expert would be utilized. We conclude that such request was predicated on the fact that

such expert would be nice to have in the event that something developed either prior to trial or during the trial.

In the military an accused has the resources of the government at his disposal. In the usual case the investigative, medical, and other expert services available within the military are sufficient to permit the defense to adequately prepare for trial. *Garries, supra.* We conclude that the military judge did not err in denying the defense motion to have the government fund their specifically requested expert consultant and the government provided an adequate substitute within the meaning of R.C.M. 703(d) by making Doctor Jain available to the defense. The defense cross-examination of Doctor Jain evidenced that counsel had much more than a rudimentary understanding to the processes used in urinalysis testing and in interpreting the technical test results. During cross examination Doctor Jain conceded the test results in certain areas were favorable to the accused. From our reading of the record there is no showing that denial of the requested expert consultant resulted in an unfair trial or that the appellant was in any way prejudiced by such denial. For the reasons stated herein we decide this issue against the appellant.

In arriving at our decision on this issue we are not unmindful of the recent case of *United States v. Horn*, (sic) 26 M.J. 434 (C.M.A. 1988). In our opinion the two cases are distinguishable in that in *Horn* (sic) the request for the expert witness stated exactly what the witness would testify to in the defense challenging that the government had not followed proper testing procedures in analyzing the accused's urine for cocaine metabolites.

We originally returned this case to appellate counsel for resolution of a specified issue as to whether the court had been properly instructed on their findings as to the knowledge requirement in cases involving use of cocaine as announced in *United States v. Brown*, 26 M.J. 266

(C.M.A. 1988). We conclude that the court was properly instructed. *United States v. Mance*, 26 M.J. 244 (C.M.A. 1988). Having so held we further determine the military judge did not error in refusing to give the defense requested instruction on ignorance or mistake of fact and find the assigned error to be without merit. The invited issue is decided against the appellant.

The findings of guilty and the sentence are

AFFIRMED.

[SEAL]

OFFICIAL:

/s/ Mary V. Fillman
MARY V. FILLMAN
Captain, USAF
Chief Commissioner

APPENDIX B

UNITED STATES COURT OF MILITARY APPEALS

No. 61,288
ACM 26705

UNITED STATES,

Appellee,

v.

MICHAEL E. WILLIAMS, Technical Sergeant
U.S. Air Force,

Appellant.

Sept. 8, 1989

Accused, technical sergeant, United States Air Force, was convicted by general court martial, William T. Snyder, J., of one specification of wrongful use of cocaine, and he appealed. The United States Air Force Court of Military Review affirmed, and accused petitioned for review. The United States Court of Military Appeals, Everett, C.J., held that comments of military judge during voir dire, which erroneously implied that government expert was at trial to present information binding on both parties and was not amenable to attack by accused, was not plain error.

Affirmed.

Cox, J., filed concurring opinion.

For Appellant: *Colonel Richard F. O'Hair, Major Mark R. Bell, Captain Darla G. Orndorff* (on brief).

For Appellee: *Colonel Joe R. Lamport, Lieutenant Colonel Robert E. Giovagnoni, Major Carole W. Hanson* (on brief).

Opinion of the Court

EVERETT, Chief Judge:

Contrary to his pleas, Williams was convicted by general court-martial of one specification of wrongful use of cocaine, a violation of Article 112a, Uniform Code of Military Justice, 10 USC § 912a. The members sentenced appellant to a bad-conduct discharge, confinement for 9 months, "to forfeit $150.00 of your pay for nine months," and reduction to pay grade E-3. On the recommendation of his staff judge advocate, the convening authority approved the sentence, specifically approving "forfeiture of $150.00 per month for one month." The Court of Military Review affirmed the findings and sentence in an unpublished opinion.

We granted appellant's petition for review, specifying the following issue:

> WHETHER THE MILITARY JUDGE'S INSTRUCTION THAT DR. JAIN WAS NOT A GOVERNMENT WITNESS PREJUDICED APPELLANT.

This prosecution was predicated on the results of the analysis of appellant's urine which disclosed the presence of metabolites of cocaine. To prove its case, the Government intended to call Dr. Naresh C. Jain, a forensic toxicologist. While not directly employed by the United States, Dr. Jain testifies frequently in courts-martial concerning the interpretation of scientific data derived from urinalysis.[1]

Appellant initially sought to have the Government provide him with an expert technical consultant to assist in his defense. Having lost that motion, defense counsel apparently believed that he needed to defuse the impact of

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[1] In fact Dr. Jain was the expert witness in this Court's seminal case on the subject of proof of drug use through urinalysis, *United States v. Harper*, 22 MJ 157, 160 (CMA 1986).

Dr. Jain's testimony, particularly since he would not be offering an expert witness on behalf of appellant. During *voir dire* he undertook to "sell" the members on the proposition that appellant did not need to present such testimony:

> Now, finally, the Government has hired an expert in this case by the name of Dr. Jain. Has anyone seen Dr. Jain testify before?
>
> That's a negative response. And—but Sergeant Williams won't have an expert in his case. Is there anyone who feels that—who would hold that against Sergeant Williams?
>
> That's a negative response.
>
> MJ: In that regard, I will instruct the court members that though Doctor Jain is being called by the Government for certain purposes, *that is not to imply that Doctor Jain in any way represents the Government.* Doctor Jain will be a witness called to present information. . . .

(Emphasis added).

In the strictest sense, the comments of the military judge were correct. An expert witness called by the United States is not, as such, a government representative. *Cf.* Mil.R.Evid. 615, Manual for Courts-Martial, United States, 1984 (permitting trial counsel to "designate[]" a "representative of the United States" to sit with and assist the prosecution team in the courtroom). However, the military judge's comment also implies that Dr. Jain was at the trial to present information binding on both parties and that he was not amenable to attack by appellant. This is, of course, not true since an expert may be impeached or contradicted in the same manner as any witness, his credentials may be attacked, and his testimony need not be given any more weight than that of any other witness.

However, we need not reverse appellant's conviction because of this erroneous characterization of Dr. Jain. Counsel did not object to the interjection by the military judge; therefore, the error must be measured by the standard of plain error. *United States v. Fisher*, 21 MJ 327, 328 (CMA 1986), *citing United States v. Young*, 470 U.S. 1, 17 n. 14, 105 S.Ct. 1038, 1047 n. 14, 84 L.Ed.2d 1, 13 n. 14 (1985). *See* RCM 920(f), Manual, *supra*. It must be evaluated against the entire record and in the context of the particular case. *See United States v. Fisher, supra*.

Here, counsel vigorously attacked Dr. Jain in his cross-examination, attempting to show that he was a "hired gun" for the Government who had earned over $100,000 in 5 years testifying as an expert witness for the United States. He also established through Dr. Jain that there was a substance other than raw cocaine which could produce benzoylecgonine [2] in a person's urine and demonstrated that Dr. Jain did not personally conduct the analysis in appellant's case but, rather, was merely interpreting the results.

Finally, the military judge correctly charged the members on the nature of expert testimony and the weight to be given to such testimony in his final instructions. Both this Court and the Supreme Court have held that the jury will be presumed to have followed the instructions in the absence of evidence to the contrary. *Lakeside v. Oregon*, 435 U.S. 333, 98 S.Ct. 1091, 55 L.Ed.2d 319 (1978); *United States v. Ricketts*, 1 MJ 78, 82 (CMA 1975); *see also United States v. Morris*, 13 MJ 297, 302 (CMA 1982) (Cook, J., concuring in the result).

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[2] This is the cocaine metabolite for which urine is tested. It is also found in Health Inca tea. *See United States v. Ray*, 26 MJ 468, 469 (CMA 1988), *cert. denied*, —— U.S. ——, 109 S.Ct. 797, 102 L.Ed.2d 788 (1989); *United States v. Carter*, 26 MJ 1002, 1003 (AFCMR), *pet. denied*, 27 MJ 469 (1988).

Accordingly, we are satisfied that the military judge's erroneous characterization of the status of Dr. Jain during *voir dire* did not have "an unfair prejudicial impact on the jury's deliberations." *United States v. Fisher, supra* at 328, quoting *United States v. Young, supra* 470 U.S. at 17 n.14, 105 S.Ct. at 1047 n.14.

The decision of the United States Air Force Court of Military Review is affirmed.

Judge SULLIVAN concurs.

COX, Judge (concurring):

Assuming that the military judge's comment concerning Dr. Jain, which occurred during *voir dire* of the court members, could be construed as error, I concur. However, neither appellant's trial nor appellate defense attorneys translated the comment into the descriptive language attached to it by the majority opinion. I would have preferred to dismiss this petition on the grounds that it was improvidently granted.

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No. 89-735

In the Supreme Court of the United States

OCTOBER TERM, 1989

MICHAEL E. WILLIAMS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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17 pp

QUESTION PRESENTED

Whether petitioner made an adequate factual showing that an expert toxicologist consultant was necessary to his defense that he did not use cocaine.

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In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-735

MICHAEL E. WILLIAMS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Military Appeals (Pet. App. 7a-11a) is reported at 28 M.J. 484. The opinion of the Air Force Court of Military Review (Pet. App. 1a-6a) is not yet officially reported.

JURISDICTION

The judgment of the Court of Military Appeals was entered on September 8, 1989. The petition for a writ of certiorari was filed on November 7, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3) (Supp. V 1987).

STATEMENT

Petitioner, a member of the United States Air Force, was tried by a general court-martial at McGuire Air Force Base

in New Jersey. He was convicted of the wrongful use of cocaine, in violation of Article 112a of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 912a. He was sentenced to confinement for nine months, a bad conduct discharge, forfeiture of $150 pay for nine months, and a reduction in rank. The convening authority approved the findings, reduced the forfeiture to $150 for one month, and otherwise approved the sentence. The Air Force Court of Military Review affirmed the findings and sentence. The Court of Military Appeals limited its discretionary review to one question and affirmed.[1]

1. On January 9, 1987, petitioner and other members of his unit provided urine samples at McGuire Air Force Base for a random urinalysis test. Tr. 140-141, 271. The samples were sent by registered mail to the Air Force drug detection laboratory at Brooks Air Force Base in Texas. Tr. 153-154. Tests at the Brooks laboratory and follow-up tests at the Center for Human Toxicology, a civilian laboratory, disclosed the presence of the cocaine metabolite in petitioner's urine. Tr. 186, 195; PXs 4, 5. On April 30, petitioner was charged with the wrongful use of cocaine.

2. On August 26, petitioner asked the convening authority to appoint a Dr. John Whiting, a civilian forensic expert, as an expert consultant for the defense at government expense pursuant to Rule for Courts-Martial 703(d), *Manual for Courts-Martial, United States – 1984* (*Manual*). AX 3 Attachment 1. In his request, petitioner stated that "[t]he government evidence in [the] case consists of scientific radioimmunoassay, gas chromotagraphy, and mass spectrometry test results." *Ibid.* Petitioner claimed that he needed Dr. Whiting as a defense consultant because "[t]he

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[1] The Court of Military Appeals limited its review to the question whether petitioner was prejudiced by an instruction given by the trial judge to the court-martial panel. Pet. App. 8a.

reliability of these testing procedures as well as the accuracy of the results are material issues. Without the assistance of an expert trained in these scientific procedures, the defense cannot adequately prepare to litigate these issues." *Ibid.* The convening authority denied petitioner's request without comment on September 9. AX 3; Pet. App. 2a.

Before trial, the defense filed another motion asking to have Dr. Whiting appointed as an expert defense consultant. Tr. 20; AX 3. Petitioner noted that the government intended to call Dr. Naresh Jain, a civilian forensic toxicologist, to testify at trial about the urinalysis testing procedures.[2] Petitioner asked for Dr. Whiting in order to obtain "his expert review of the forensic validity of Brooks and Center for Human Toxicology Standing Operating Procedures," and to "consult[ ] with defense counsel in the interview and cross examination of prosecution expert witnesses." AX 3, at 1. Expert assistance was necessary for the defense, petitioner claimed, because defense counsel did not "hold degrees or [have] scientific training in forensic toxicology." *Ibid.* See also *id.* at 2. Petitioner said that he had contacted Dr. Whiting and that Dr. Whiting could be available to testify at trial. *Id.* at 1.

The trial judge held a hearing on the motion, at which Dr. Jain testified. Dr. Jain said that he did not test petitioner's urine sample and that he was retained by the government to testify about the chain of custody, the integrity of petitioner's sample, and the urinalysis test procedures used to determine whether there was evidence of drug use. Dr. Jain also said that he was available to consult with the defense, and that he would inform the defense of any

[2] In a military prosecution for the wrongful use of drugs based on the results of a urinalysis test, the government must use expert testimony to explain the laboratory test results. *United States* v. *Murphy*, 23 M.J. 310 (C.M.A. 1987); *United States* v. *Harper*, 22 M.J. 157 (C.M.A. 1986).

irregularities in the test procedures and that he had done so in other cases in the past. He noted that, based on his study of the matter, he would testify that the urinalysis procedures used in this case were forensically valid. Dr. Jain testified on cross-examination that some other experts, including Dr. Whiting, might prefer to use a testing method other than those used in this case, but that no expert in the field would criticize the testing procedure used in this case as being inaccurate. Tr. 21-43.

Dr. Jain explained that the gas chromotagraphy/mass spectrometry urinalysis test could use either the chemical ionization testing method or the electron impact testing method. Dr. Jain testified that he knew of at most three experts, including Dr. Whiting, who preferred the electron impact test, which was not performed on petitioner's urine sample, to the chemical ionization procedure, which was used to test petitioner's urine. At the same time, according to Dr. Jain, those experts would not say that the chemical ionization procedure used in this case was inaccurate. In fact, Dr. Jain testified that no expert had ever criticized the chemical ionization procedure as being inaccurate. Tr. 34-37. The chemical ionization test procedure had been used for ten years on thousands of samples, and the results from that procedure had always been corroborated by other procedures, including the electron impact test method. In Dr. Jain's words, "[n]ot a single scientist in this world has published any information saying that chemical ionization can result in erroneous answers." Tr. 41. Dr. Jain said that the chemical ionization method was sensitive to very small samples, but that the equipment involved in that procedure was the "most expensive" available. *Ibid.* Dr. Jain added that another test, the radioimmunoassay test, was also performed on petitioner's urine sample. *Ibid.*

After the hearing, the defense reiterated its claim that it was entitled to an expert consultant, because defense counsel

had no training in forensic toxicology, even though the defense at trial would be that petitioner had never used cocaine. Tr. 44.[3]

The trial judge denied the motion and made detailed findings of fact and conclusions of law. Tr. 53-56, 66; AX 5. The judge found, inter alia, that defense counsel's questions of Dr. Jain during the hearing reflected "a most impressive base of knowledge of and familiarity with the procedures used in performing urinalysis, including the calibration of the equipment," that defense counsel "is obviously knowledgeable of the [urinalysis testing] methods other than those used by [the Department of Defense]," and that defense counsel had prior experience in urinalysis cases, including at "least one prior case where Dr. Jain was the expert witness." Tr. 55. The court also concluded that "the science or technology involved in this case is not the issue," *ibid.*, and that "[t]he real issues" were whether the tested urine sample came from petitioner and whether the laboratories followed proper procedures during their tests. Tr. 56. "Those issues do not impact the reliability of the underlying science involved. Neither does the availability of tests other than the one employed." *Ibid.* Concluding that "there has not been a demonstrated need for a consultant from outside government resources," the judge denied the defense request to have Dr. Whiting appointed as a defense expert at government expense. *Ibid.* After unsuccessfully attempting to find a government expert who could serve

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[3] In response to a question from the bench whether the defense was seeking a consultant or a witness, the defense replied, "A consultant, your Honor, except in the event that the doctor testifies to something on direct examination which I haven't heard yet, I will then have a rebuttal witness who can testify in rebuttal to the government's case in chief." Tr. 44. See also Tr. 69-70.

as a defense consultant,[4] the trial judge ruled that Dr. Jain was an adequate substitute because he was not "biased," nor did he "favor[ ] any side." Tr. 76.

Dr. Jain testified during the government's case-in-chief. Defense counsel conducted an extensive cross-examination, Tr. 198-225, 227-229, 237-238, and did not renew the request for an expert consultant at the completion of Dr. Jain's testimony or at the close of the government's case-in-chief, Tr. 238-239. Petitioner subsequently testified in his defense at trial. He denied using cocaine, but he offered no explanation for the presence of the cocaine metabolite in his urine sample. Tr. 277-281.

3. The Air Force Court of Military Review affirmed. Pet. App. 1a-6a. It rejected petitioner's claim that the trial

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[4] Before ruling on the motion, the trial judge directed the government to determine whether there were any expert military personnel available to substitute for Dr. Whiting. Tr. 48. The prosecutor made an inquiry, and after the judge made his ruling the prosecutor indicated that he was trying to determine whether other experts were available. Tr. 57-58. Defense counsel suggested that the prosecutor should ask the convening authority whether Dr. Whiting should be appointed. Tr. 58-59. The trial was recessed while the prosecutor checked with the convening authority about Dr. Whiting. Tr. 59. When the trial reconvened, the prosecutor said that two persons at the Brooks laboratory were available for the defense. The defense objected to their use on the ground that they suffered from a conflict of interest, because they had conducted the tests on petitioner's urine sample. Tr. 59-61. Regarding Dr. Whiting, the government said that the convening authority was not available, but that the staff judge advocate would recommend that the request be denied and that the government would offer Dr. Jain as an adequate substitute. Tr. 62. Defense counsel did not consider Dr. Jain to be an adequate substitute and wanted the consultant to be able to serve as a potential defense witness. Tr. 67-68. Relying on his earlier findings, the trial judge found that the government had made "an earnest search" for a government expert, Tr. 67, and denied trial defense counsel's request for a military expert consultant, holding that Dr. Jain was an adequate substitute. Tr. 72, 76.

court erred by denying the defense request for an expert consultant. *Id.* at 4a-5a. The court found that petitioner's "requests for an expert consultant did not state specifically, or even generally, in just what capacity such expert would be utilized," *id.* at 4a, and the court concluded that the defense request was "predicated" on the belief that an expert "would be nice to have in the event that something developed" before or during trial, *id.* at 4a-5a. The court also held that, in light of defense counsel's knowledge of the urinalysis testing processes (as shown by his cross-examination of Dr. Jain), the denial of the requested consultant did not prejudice petitioner. *Id.* at 5a.

4. Petitioner then sought review in the Court of Military Appeals. Petitioner raised in his petition seeking review before that court the question whether he was entitled to a expert consultant at trial, but the Court of Military Appeals declined to grant review on that question. Instead, that court limited its grant of review to the the validity of an instruction, Pet App. 8a, and found that the instruction was not plain error, *id.* at 8a-11a.

ARGUMENT

Petitioner contends that the trial judge denied him access to a qualified expert consultant in violation of the Due Process Clause and this Court's decision in *Ake* v. *Oklahoma*, 470 U.S. 68 (1985). That claim lacks merit. Petitioner did not make a sufficient showing that an expert consultant was necessary for his defense. The trial judge therefore did not err in denying petitioner's application to have a private consultant appointed at government expense.[5]

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[5] It is also not clear that the question presented in the certiorari petition is subject to review in this Court. The statutes authorizing this Court to review by a writ of certiorari the judgments of the Court of Military Appeals, 28 U.S.C. 1259(3) (Supp. V 1987) and 10 U.S.C. 867(h)(1),

In *Ake* v. *Oklahoma*, this Court held that when an indigent defendant demonstrates to the trial judge that his sanity at the time of the crime is to be a significant factor at his trial, the State must provide the defendant with access to a competent psychiatrist who will conduct an appropriate examination and assist in the preparation and presentation of the defense. 470 U.S. at 83. The rationale underlying the decision in *Ake* was that psychiatric evidence can be so important in a case that turns on the defendant's mental state that the assistance of a psychiatrist may be crucial to the defendant's ability to marshal a defense. *Id.* at 80. Without such assistance, an indigent defendant may be so disabled from mounting an effective defense that "the risk of an inaccurate resolution of sanity issues is extremely high." *Id.* at 82.

The military justice system has faithfully applied the principles of *Ake*. As the court of military review explained, Pet. App. 4a, under military law a servicemember accused of a crime has an equal opportunity to obtain expert assistance, even on questions other than a defendant's sanity

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restrict this Court's certiorari jurisdiction to "decisions" of the Court of Military Appeals. Section 867(h)(1) further provides that this Court may not review by certiorari "any action of the Court of Military Appeals in refusing to grant a petition for review." The Court of Military Appeals has the statutory right, which it exercised in this case, to limit its decision in any case to less than all of the issues urged by a defendant. 10 U.S.C. 867(d). Since the Court of Military Appeals accepted for review only an instructional issue and did not grant review on the question presented in the certiorari petition, there is a question whether that court rendered a "decision[ ]" on the question that petitioner has presented in his petition, and whether the court's refusal to accept that question constituted an "action" of that court "in refusing to grant a petition for review" within the meaning of 10 U.S.C. 867(h)(1). Those issues do not require an answer in this case, however, since the question presented in the certiorari petition does not warrant review by this Court in any event.

at the time of the crime, if he can show why such assistance is relevant and necessary to a significant issue in his case. See, *e.g.*, *United States* v. *Toledo*, 25 M.J. 270, 276 (C.M.A. 1987); *United States* v. *Garries*, 22 M.J. 288, 290 (C.M.A. 1986), cert. denied, 479 U.S. 985 (1986); *United States* v. *Mustafa*, 22 M.J. 165, 168-169 (C.M.A.), cert. denied, 479 U.S. 953 (1986); Art. 46, UCMJ, 10 U.S.C. 846; Rule 703(d), Rules for Courts-Martial; Mil. R. Evid. 702, *Manual*. Compare *Ake*, 470 U.S. at 83. Indeed, the military courts have taken *Ake* considerably farther than this Court, since they have held that the principles of *Ake* are applicable even in the absence of any proof of indigency on the part of the accused. See *United States* v. *Mustafa*, 22 M.J. at 168-169.

Contrary to his claim, petitioner was not denied any relief to which he was entitled under *Ake*. Unlike the defendant in *Ake*, who was denied the assistance of an independent psychiatrist, petitioner had the benefit of an independent toxicological examination of his urine sample by a neutral civilian laboratory, the Center for Human Toxicology.[6] To be sure, that laboratory confirmed the presence of the cocaine metabolite in petitioner's urine, and that finding did not support petitioner's claim of innocence. But *Ake* does not guarantee a defendant the assistance of an expert who will reach a conclusion that pleases the defendant. *Ake*

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[6] The trial judge also appointed Dr. Jain to assist the defense after finding that he was not a partisan witness. In some cases, the assistance required by *Ake* can be satisfied by the appointment of a government expert to help the defense understand complex scientific evidence. That is particularly true when the field in question is less subject to the type of uncertainty that is characteristic of psychiatry, the subject matter involved in *Ake*. See *Stephens* v. *Kemp*, 846 F.2d 642, 650 (11th Cir.) (ballistics expert), cert. denied, 109 S. Ct. 189 (1988); *McKinley* v. *Smith*, 838 F.2d 1524, 1530 (11th Cir. 1988) (pathologist). Urinalysis testing would also appear to be one of those areas.

guarantees only that an indigent defendant in a case raising a serious issue as to which expert assistance is necessary have access to a competent expert "who [is] not beholden to the prosecution," 470 U.S. at 83, 85, to conduct any necessary examinations and assist the defense. The government has no obligation to supply the defendant with a series of experts until the accused finds one who will support his defense. *Id.* at 79, 83.

Petitioner claims that an independent defense expert is necessary since the only defense that a servicemember can present when charged with narcotics use based on a urinalysis test is a defense that challenges "the urinalysis results" or the "validity of an urinalysis," and that the assistance of an expert toxicologist is crucial to such a defense. Pet. 7.[7] That contention is flawed in several respects. In the first place, a defendant can always try to show that, due to a flaw in the chain of custody or a mistake in the laboratory procedures used in his case, a positive urinalysis test result cannot fairly be attributed to drug use. Neither defense requires the assistance of a toxicologist. An attorney is well equipped to challenge the government's proof that the tested urine sample is the one taken from

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[7] At trial, petitioner also claimed that expert assistance was necessary because defense counsel lacked any training in forensic toxicology. Petitioner has not renewed that claim in this Court, and it lacks merit in any event. Defense counsel has the obligation to educate himself about the relevant scientific field in order to show that expert assistance is necessary to the defense. *Stephens* v. *Kemp*, 846 F.2d at 646-647; *Moore* v. *Kemp*, 809 F.2d 702, 712 (11th Cir.) (en banc), cert. denied, 481 U.S. 1054 (1987). What is more, as the record shows and as the trial judge colorfully put it, defense counsel was "no rookie to urinalysis cases." Tr. 44. The court of military review found that defense counsel's cross-examination of Dr. Jain revealed that counsel had "much more than a rudimentary understanding [of] the processes used in urinalysis testing and in interpreting the technical test results." Pet. App. 5a.

the defendant, or to question whether a laboratory followed the correct procedures in testing the defendant's sample. Moreover, a defendant who believes that a positive urinalysis result is due to his unknowing ingestion of a substance that turned out to contain narcotics can so testify at trial, with or without supporting character witnesses, but certainly without the need for a defense toxicologist.

Petitioner asserts that it is "[c]ommon knowledge among military judge advocates" that "there are several qualified experts that question the validity of the Department of Defense (DOD) urinalysis testing program, especially when testing for cocaine." Pet. 7. A defense toxicologist is therefore necessary, petitioner argues, in order to mount an attack on the ability of the DOD urinalysis procedures to detect the cocaine metabolite in urine. In particular, petitioner asserts that Dr. Whiting would have supported that claim, and that the trial court thus erred in denying his request to have Dr. Whiting made a defense expert.

Petitioner, however, failed to make the necessary factual showing to support such a claim in the trial court. Petitioner asserted that the reliability of the urinalysis testing procedures and the accuracy of the test results would be material issues in his case, but he proffered no factual support whatever for those assertions in his request to the convening authority, in his pretrial motion, or at the pretrial hearing. The only evidence presented at the pretrial hearing on this issue came from Dr. Jain, and far from supporting petitioner's claim, Dr. Jain's testimony undermined it. Dr. Jain said that although Dr. Whiting preferred a different test from the one used in petitioner's case, Dr. Whiting would not say that the test used in petitioner's case was unreliable. Moreover, petitioner did not make a proffer of any contrary testimony that he expected Dr. Whiting to provide, even though petitioner had contacted Dr. Whiting nearly two months before trial, AX 3 Attachment 1, nor did peti-

tioner cite any scientific journal or literature of any type that would support his claim.[8] (In fact, petitioner has cited no such material in his certiorari petition.) Under these circumstances, there is no merit to petitioner's claim that Dr. Whiting's assistance or testimony would have supported his innocence.

In sum, petitioner failed to carry his burden under *Ake*. If the reliability of the urinalysis tests performed by the Brooks laboratory and the Center for Human Toxicology was a significant issue in the case, it was incumbent upon petitioner to spell out that claim. Since petitioner offered nothing more than the vague and unsubstantiated assertion that the urinalysis procedures were unreliable, the trial court did not err by declining to appoint Dr. Whiting as a defense expert. See, *e.g.*, *Caldwell* v. *Mississippi*, 472 U.S. 320, 323 n.1 (1985); *Stephens* v. *Kemp*, 846 F.2d 642, 646-650 (11th Cir.), cert. denied, 109 S. Ct. 189 (1988); *Moore* v. *Kemp*, 809 F.2d 702, 712 (11th Cir. 1987) (en banc), cert. denied, 481 U.S. 1054 (1987); *United States* v. *Tornowski*, 29 M.J. 578, 581 (A.F.C.M.R. 1989); *United States* v. *Fontenot*, 26 M.J. 559, 562 (A.C.M.R.), pet. granted other grounds, 27 M.J. 460 (1988), hearing held, 28 M.J. 262 (1989).

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[8] Petitioner had ample opportunity to make that showing. Petitioner knew almost two months before trial that the government intended to call Dr. Jain as a witness, see Tr. 2; AX 3; the government made discovery materials, including the laboratory procedures and results, known to the defense before trial, see Tr. 64; the government made Dr. Jain available to the defense before the pretrial hearing, see Tr. 23, 74; and defense counsel conceded that he had an adequate opportunity to review the laboratory procedures and results and to discuss them with Dr. Jain before the hearing, Tr. 74. A liberal discovery policy, like the one used in the military justice system, helps to show that petitioner had the tools to explain why a defense expert was necessary for his case. See *Moore* v. *Kemp*, 809 F.2d at 712 n.10.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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